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EXAMINER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte SOLGUN DREVIK, CHATRINE STRIDFELDT,
and ANGELICA BURVALL

Appeal 2014-005497
Application 12/299,394
Technology Center 3700

Before JENNIFER D. BAHR, EDWARD A. BROWN, and JILL D. HILL,
Administrative Patent Judges.

HILL, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Solgun Drevik et al. (“Appellants”) appeals under 35 U.S.C. § 134(a) from the Examiner’s decision to reject claims 21–43. We have jurisdiction under 35 U.S.C. § 6(b). Oral argument was heard on October 13, 2016.

We AFFIRM.

CLAIMED SUBJECT MATTER

Independent claims 21, 22, 37, and 38 are pending. Claim 21, reproduced below, illustrates the subject matter on appeal.

21. A packing wrapper for an absorbent article, the wrapper comprising:

a protective layer, and

a first functional layer attached to the protective layer,

wherein the first functional layer is positioned on a face of the wrapper facing the absorbent article or on a face of the wrapper facing away from the absorbent article,

wherein the first functional layer is a wiping layer adapted for absorbing or adsorbing a liquid or particles from a surface and/or a transfer layer adapted for transferring a substance to a surface,

wherein the protective layer and the first functional layer form separate layers removably attached to each other by a means of attachment, and the protective layer and the first functional layer are in direct contact with each other.

REJECTIONS¹

I. Claims 21–43 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Steger (US 6,911,022 B2; iss. June 28, 2005) and Morin (US 5,111,934; iss. May 12, 1992). Final Act. 3.

II. Claims 21–43 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Steger and Dunshee (US 5,487,932; iss. Jan. 30, 1996). Final Act. 16.

¹ The rejection under 35 USC § 112, first paragraph, has been withdrawn. Final Act. 2–3; Ans. 29.

III. Claims 21–43 stand rejected on the ground of non-statutory obviousness-type double patenting over claims 20–39 of co-pending patent U.S. Application No. 12/299,553.² Final Act. 31.

ANALYSIS

Rejection I

Independent Claim 21

Appellants argue claims 21, 23, 26, and 31–36 as a group. We select claim 21 as representative. Claims 23, 26, and 31–36 stand or fall with claim 21. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Claim 21 recites, *inter alia*, that “the protective layer and the first functional layer form separate layers removably attached to each other . . . [and] are in direct contact with each other.” The Examiner finds this teaching in Steger. Final Act. 4 (citing Steger Figs. 4–5, 7). The Examiner also finds that, although Steger’s materials “would provide degrees of ‘physically bonded or joined’ elements” and “Steger discloses ultrasonic bonding, thermal bonding, and adhesively bonding between layers . . . with respect to the first functional layer and protective layer attached to each other and in direct contact,” Morin’s similar device comprises “a protective layer (16) and a first functional layer (at 24) attached to each other and in direct contact (via 20 . . .).” *Id.* at 4–5.

The Examiner concludes that it would have been obvious “to modify Steger in view of Morin to provide attachment means between two layers in order to secure a functional layer such as a towel type sheet to the device.”

² Co-pending patent application no. 12/299,553 was abandoned on October 8, 2015.

Id. at 5. According to the Examiner, “it is well known in the art to provide alternative means of attachment such as ultrasonic welding/bonding, embossing, coating, impregnating, heat sealing, needling, stitching, thermomechanical bonding, thermal bonding, adhesive bonding, gluing, etc.,” and “substituting [such] equivalents known for the same purpose on the basis of its suitability for the intended use was an obvious extension of the prior teachings.” *Id.*

Appellant argues that the wipe 80 and pouch 70 of Steger’s device may be in direct contact with each other, but are not joined or attached to each other. Appeal Br. 8. Even if this is the case, the Examiner finds that Morin teaches this limitation. Final Act. 5.

Regarding Morin, Appellants argue that its sponge-type towel sheet 24 is adhered to the plastic backing 16 via adhesive 20, but “is not in direct contact with the plastic sheet backing 16.” Appeal Br. 15–16. Appellants also argue that although the edges of Morin’s sheets 12–18 may be “glued, heat-sealed or otherwise sealingly secured to each other,” Morin never states that adhesive 20 includes such an adhesive. *Id.*

In arguing that Steger fails to disclose adhesive and Morin fails to disclose direct contact, Appellants are arguing the references separately, rather than arguing the combination of references proposed by the Examiner, wherein Morin’s adhesive is added to Steger’s direct contact construction. Appellants’ arguments do not take into account what the collective teachings of the prior art would have suggested to one of ordinary skill in the art, and are therefore ineffective to rebut the Examiner’s prima facie case of obviousness. *See In re Keller*, 642 F.2d 413, 425 (CCPA 1981) (“The test

for obviousness . . . is what the combined teachings of the references would have suggested to those of ordinary skill in the art.”).

Further, regarding the Examiner’s proposed reason for combining Steger and Morin, Appellants argue that Morin doesn’t teach any equivalents for the adhesive 20 between its backing 16 and its towel 24, and that the Examiner fails to establish that the alleged equivalents (i.e., ultrasonic welding/bonding, embossing, coating, impregnating, heat sealing, needling, stitching, thermomechanical bonding, thermal bonding, adhesive bonding, gluing) “are equivalents in the same environment” such that substitution thereof would be obvious. Appeal Br. 16.

The relative sections of Steger and Morin are directed to the environment of wipe/towel/napkin containment. Absent any further explanation regarding how the environments of Steger and Morin differ, and why such a difference negates combinability or equivalence of adhesives, we are not persuaded by this argument.

Appellants still further argue that Steger does not recognize a need to further secure its wipe 80 in the pouch 70, and thus there is no reason to modify Steger to include such securement. Appeal Br. 17. This argument is not persuasive, however, because it is Morin, rather than Steger, that appreciates the benefit of adhering its towel 24 to a backing 16. For the reasons set for above, we sustain the rejection of claim 21. Claims 23, 26, and 31–36 fall with claim 21.

Independent Claim 22

Appellants argue claims 22, 24, 27, and 28 as a group. We select claim 22 as representative. Claims 24, 27, and 28 stand or fall with claim 22.

Claim 22 recites first and second functional layers attached to a protective layer. The Examiner finds this teaching in Steger's first functional layer, 82, second functional layer 84, and protective layer 76. Final Act. 8 (citing Steger Fig. 5). The Examiner states that, "[a]lthough it is believed that materials in Steger . . . provide degrees of 'physically bonded or joined' elements . . .," Morin discloses attaching a functional layer 24 to a protective layer 16 and a first functional layer (via adhesive 20). *Id.* at 8–9. The Examiner again reasons that it would have been obvious "to modify Steger in view of Morin to provide attachment means between two layers" to secure the functional layers to Morin's device. *Id.* at 9.

Appellants argue that, "to the extent that one might modify Steger et al. by adhering the wet wipe 82 to the protective layer 76, in view of the teachings of Morin, there lacks an apparent reason to also adhere the dry wipe 84 to the protective layer 76." Appeal Br. 18. Appellants further argue that different adhesions would be needed for wet and dry wipes. *Id.* at 19.

Appellant's conclusory arguments fail to explain the difference between wet and dry wipes, and how such difference affects the applicability of Morin's teachings to Steger or the type of adhesive used. We therefore are not persuaded by this argument. Thus, we sustain the rejection of claim 22.

Claims 24, 27, and 28 stand or fall with claim 22.

Dependent Claim 25

Dependent claim 25 recites that "the protective layer is coated onto the second functional layer." The Examiner determines that claim 25 is a product-by-process claim, such that the term "coated onto" adds no

patentable distinction, and patentability is determined based on the product itself. Final Act. 9–10; *see In re Garnero*, 412 F.2d 276, 279 (CCPA 1979). The Examiner also finds that Steger and Morin disclose various adhesives that the Examiner considers to be coatings, because the adhesives are not supported by their own structure (e.g., ultrasonic bonding, thermal bonding, adhesive bonding, gluing, heat-sealing), and that it is known in the adhesive art “to provide alternative means of attachment such as ultrasonic welding/bonding, embossing, coating, impregnating, heat sealing, needling, stitching, thermomechanical bonding, thermal bonding, adhesive bonding, gluing, etc.,” making the selection of an adhesive *coating* at least obvious to one skilled in the art. Final Act. 10.

Regardless of whether the Examiner is correct in determining that the adhesives of Steger and Moran are structurally the same as a coated layer, the claim recites that the *protective* layer is coated, and the Examiner fails to establish that the adhesives referred to in Steger and Moran provide such a protective coating. We therefore do not sustain the rejection of claim 25.

Dependent Claim 29

Claim 29 recites that “the first or second functional layer comprises an active substance which can be activated by contact with water or heat or in contact with air or can be activated by mechanical action.” The Examiner finds that Steger discloses a functional layer comprising “an active substance which can be activated by contact with water or heat or in contact with air or can be activated by mechanical action such as breaking of a capsulated unit.” Final Act. 11 (citing Steger 9:38–10:67; 12:47–64); Ans. 36–37.

Appellants agree that Steger discloses its wipe includes mineral oils, an emollient, surfactants, alcohols, perfumes, antimicrobial agents, pH

buffers, silicones, skin conditioning substances, “or any other substances known in the art for inclusion in cleansing wipes.” Appeal Br. 20 (citing Steger 10:22–39). Appellants argue, however, that the Examiner “fails to identify any specific substance among those described in Steger et al. which can be activated by contact with water or heat or in contact with air or can be activated by mechanical action.”

Appellants’ Specification discloses the following regarding the meaning of the limitation “active substance:” (1) an active substance can include a lotion, an anti-bacterial substance, a moisturizer, a soap, an odor-control agent (for example, a perfume), “or any other suitable substance or active agent” (Spec. 5, ll. 17–19), an odor-control agent including; and (2) an active substance can additionally include a skincare agent, a lactic acid producing bacteria (Spec. 26, ll. 13–18). Appellants’ Specification does not disclose the method of activation of each “active substance.”

Given that there is overlap between the content of Steger’s wipes and the active substances disclosed in Appellants’ Specification, we are not persuaded that the Examiner’s failure to identify the method of activation of Steger’s substances evidences error in the rejection, particularly given that Appellants also fail to identify the method of activation of each substance. We sustain the rejection of claim 29.

Dependent Claim 30

Claim 30 recites the wrapper comprising “a release layer laminated onto” the first or second functional layer. The Examiner treats “laminated onto” in claim 30 as a product-by-process limitation, and finds that Steger discloses a release layer attached to a functional layer, and Morin discloses gluing and heat sealing, which result in a laminated product. Final Act. 11–

12. Appellants contend that “laminated onto” provides a structural limitation. Appeal Br. 21.

The Examiner has the better position. Appellants have not claimed “a lamination” or even a laminated layer (i.e., a noun), but rather have claimed a layer “laminated onto” another later (i.e., a verb). “Laminated” denotes a process. Appellants have not explained how or why the term “laminated” limits the structure of the claimed release layer, and how such structure would be distinguished from the disclosed layers of Steger and Morin. Lacking such an explanation, we sustain the rejection of claim 30.

Independent Claim 37

Claim 37 recites, *inter alia*, a second functional layer being “attached at edge portions thereof to [a] protective layer thereby forming a pocket between the protective layer and the second functional layer.” The Examiner finds that Steger discloses this limitation “(as in [Fig.] 5, 84 is attached at edges at contact with 76; pocket at corner space between 82/84, 76, 75/74).” Final Act. 13. The Examiner also finds that, if Steger does not disclose attachment of the second functional layer to the protective layer, Morin discloses functional layer attachment with adhesive 20, such that applying Morin’s adhesive 20 to attach Steger’s second functional layer 84 to its protective layer 76 would yield the indicated pocket “at corner space between 82/84, 76, 75/74.” *See id.* at 13–14.

Appellants argue, as for claim 1, that Steger’s functional layer 84 is not attached to its protective layer, and that Morin does not disclose adhering a dry towel, such that one skilled in the art “would have had no apparent reason to modify Steger et al. by adhering the dry wipe 84.” Appeal Br. 22–

23. We are not persuaded by the arguments for the reasons set forth above regarding claims 21 and 22.

Appellants also argue that “the corner space in Fig. 5 of Steger et al. referred to by the Examiner is a triangle-like space surrounded by layers 84, 76, 75 and thus does not constitute a ‘pocket’ between the layers 84 and 76.” *Id.* at 23. The Examiner responds that a “pocket is merely an opening between layers.” Ans. 37. Appellants provide no intrinsic or extrinsic definition of the term “pocket” that excludes, or that can be used to differentiate the claimed pocket from, the triangular space surrounded by Steger’s layers 84, 76, 75. Absent provision of a definition and explained differentiation, we are not persuaded by Appellants’ argument, and we sustain the rejection of claim 37.

Independent Claim 38

Claim 38 recites, *inter alia*, a first separating layer attached to a first protective layer, and a second separating layer attached to a second protective layer, “wherein the two separating layers separate the two protective layers.” The Examiner finds this disclosure in Steger’s first functional layer 82, first protective layer, 76, first separating layer 74, and its second functional layer 84, second protective layer 75, and second separating layer 46’. Final Act. 14. The Examiner contends that “the two separating layers (74, 46’) separate the two protective layers (76, 75; the layers are able to separate)” to separate the wrapper into “a first unit comprising the first functional layer (82), the first protective layer (76) and the first separating layer (74) and a second unit comprising the second functional layer (84), the second protective layer (75) and the second separating layer (46’).” *Id.* at 14–15. While Steger’s release backing 46’,

which resides between the napkin and the wipe, is labeled in Figure 4, it is Steger's Figure 5 that illustrates the Examiner's proposed separating layers, protective layers, functional layers, and the separability thereof.

Appellants repeat certain arguments presented in opposing the rejection of independent claims 21 and 22. Appeal Br. 24. For the reasons set forth above, we are not persuaded by those arguments.

Appellants then essentially argue that Steger's separating layers 74, 46' fail to *both* act to separate the two protective layers 76, 75 *from each other*. Appeal Br. 25 (Steger's "'separating' layers 74, 46' are located outside the two 'protective' layers 76, 75, and thus do not separate the two 'protective' layers 76, 75.>"). Claim 38, however, does not recite that *both* of the separating layers function to separate the two protective layers *from each other*. We decline to construe the claim to require that both of the separating layers function to separate the two protective layers from each other. Appellants' argument, therefore, is not commensurate with the scope of claim 38, and we are thus not persuaded by Appellants' argument. We sustain the rejection of claim 38.

Dependent Claim 39

Claim 39 depends from claim 38, and recites that "the second separating layer is attached at edge portions thereof to the second protective layer" to form "a pocket between the second separating layer and the second protective layer, so that the second unit is adapted to be used as a glove." The Examiner finds that Steger's "second unit is adapted to be used as a glove (the device is able to perform the intended use described above; pocket at corner space between 82/84, 76, 75/74)." Final Act. 16.

Appellants argue that Steger's release strip 46' does not form a unit adapted to be used as a glove. Appeal Br. 25. We agree with Appellants. While we agree with the Examiner that Steger discloses a pocket "at corner space between 82/84, 76, 75/74," the Examiner's conclusory finding has not persuaded us that Steger's pocket is "adapted to be used as a glove" as required by claim 39. Final Act. 16. We therefore do not sustain the rejection of claim 39.

Dependent Claims 40–43

Each of claims 40–43 recite that "the packing wrapper has a surface larger than an entire surface of the absorbent article in a flat state." The Examiner finds that, referencing Steger's Figure 7, its package wrapper surface 48 is larger than the entire surface of its absorbent article 26. Final Act. 16.

Appellants argue that Steger's wrapper 48 is "structurally different from the pouch 70, which is considered by the Examiner to correspond to the packing wrapper." Appeal Br. 26. We agree with Appellants. In addressing the "packing wrapper" recited in independent claims 21, 22, 37, and 38, from which claims 40–43 depend, respectively, the Examiner finds that "the wrapper compris[es] a protective layer (76), and a first functional layer (82) attached to the protective layer (as in fig. 5).³ Final Act. 5. This finding appears to be at odds with the Examiner's finding that Steger's release liner 48 is the packing wrapper. While it is possible that, for claims 40–43, the Examiner considers the packing wrapper to include all of at least

³ The Examiner also finds that the packing wrapper includes the second functional layer and the second protective layer when considering independent claims 22, 37, and 38. Final Act. 8, 12, 14.

the protective layer 76, the first functional layer 82, and the release liner 48, the Examiner has not clearly set forth this finding. Therefore, the Examiner's finding that release liner 48 is the packing wrapper of claims 40–43 appears to be at odds with the Examiner's earlier findings regarding the packing wrapper of independent claims 21, 22, 37, and 38. We therefore do not sustain the rejection of claims 40–43.

Rejection II

The Examiner makes findings regarding the disclosures of Steger and Dunshee, concluding that it would have been obvious to modify Steger by adding Dunshee's attachment means "(as described in col. 6: 29-51 of Dunshee)" between two layers, "to secure and stabilize a functional layer thereby preventing undesired movement during opening and use while also creating an improved flush surface (col. 6: 29-51 of Dunshee)." Final Act. 18.

The only argument presented against Rejection II is that there is "no apparent reason to combine Steger et al. and Dunshee." Appeal Br. 26. According to Appellants, Steger intends for its wipe 80 to be separated from its pouch 70 in use, whereas Dunshee intends for its pad 20 to remain secured to its package portions 12, 14. *Id.* at 27–28. Thus, Appellants contend, modifying Steger to include the attachment means of Dunshee, would cause Steger's wipe 80 to remain secured to its pouch, which would render Steger unsatisfactory for its intended purpose. *Id.* at 28. We understand Appellants to be contending that the intended purpose of Steger's invention is to provide a wipe that can be released from its pouch. We disagree with the proffered intended purpose. Steger's invention is directed to packaging for sanitary napkins having a wipe associated therewith, and its

intended purpose is to provide a desirable flap disposition and easy access to the wipe. *See* Steger 1:7–9; 2:31–42. We are not persuaded that Dunshee’s attachment means would render Steger unsuitable for this intended purpose. We sustain Rejection II.

Rejection III

Because co-pending patent U.S. Application No. 12/299,553 was abandoned on October 8, 2015, we reverse the double patenting rejection as moot. MPEP § 804(I)(C) (“If the published application has not yet issued as a patent, the examiner is permitted to make a ‘provisional’ rejection on the ground of double patenting when the published application *has not been abandoned*.”).

DECISION

We AFFIRM the rejection of claims 21–24 and 26–39 under 35 U.S.C. § 103(a) as unpatentable over Steger and Morin.

We REVERSE the rejection of claims 25 and 40–43 under 35 U.S.C. § 103(a) as unpatentable over Steger and Morin.

We AFFIRM the rejection of claims 21–43 under 35 U.S.C. § 103(a) as unpatentable over Steger and Dunshee.

We REVERSE as moot the rejection of claims 21–43 under the ground of non-statutory obvious-type double patenting over claims 20–39 of co-pending U.S. Application No. 12/299,553 (now abandoned).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED